Supreme Court, U.S.
FILED
APR 28 1992
OFFICE OF THE CLERK

No. 91-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

SHARON SIEDORF CARDENAS
TED KOBEY, JR.
Office of the City Attorney
City of Sacramento
921 Tenth Street
Seventh Floor
Sacramento, CA 95814
(916) 264-5346

MARC B. MIHALY *
ALLETTA D'A. BELIN
RICHARD S. TAYLOR
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Counsel for Respondents

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Where the uncontradicted evidence before the City of Sacramento demonstrated that new commercial development in the City is the most significant cause of the increased demand for new low-income housing, did the City violate the takings clause of the Fifth Amendment of the U.S. Constitution by requiring commercial developers to pay a fee to partially offset the increased burden on the city attributable to that development?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. The 1989 Housing Trust Fund Ordinance	2
B. State Restrictions on Local Government Fees	3
C. Preparation and Adoption of the Housing Trust Fund Ordinance	4
D. District Court Opinion	9
E. Ninth Circuit Opinion	9
REASONS FOR DENYING THE WRIT	10
I. THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW; THE CITY'S LEGISLATIVE DETERMINATIONS SATISFY THE REQUIREMENTS OF THE TAKINGS CLAUSE	10
A. The City Established a Cause-and-Effect Relationship Between Commercial Development and Demand for Affordable Housing as Required by the Takings Clause and *Nollan*	11
B. The City Received No Contradictory Evidence Regarding the Cause-and-Effect Relationship Between Commercial Development and Demand for Affordable Housing; The Ninth Circuit Properly Affirmed Summary Judgment	14
C. Fundamental Fairness Supports the City's Requirement that Commercial Development Offset at Least Some of the Affordable Housing Program Costs Attributable to That Development; The Ordinance Does Not Single Out Developers to Bear a Public Burden	16

TABLE OF CONTENTS—Continued

Page

D. Petitioner's Novel Theories Would Undermine Governmental Authority To Impose Widely Accepted Impact Fees 18

II. THE NINTH CIRCUIT PROPERLY APPLIED A HEIGHTENED DEGREE OF SCRUTINY AS REQUIRED BY *NOLLAN* AND OTHER CASES OF THIS COURT 22

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS 24

A. There is No Conflict Among the Federal Courts 24

B. There is No Conflict with the Decisions of State Courts 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases — Page

Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988) 25, 26
Agins v. City of Tiburon, 447 U.S. 255 (1980) 26
Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991) 22, 24
Blue Jeans Equities West v. City and County of San Francisco, 3 Cal.App.4th 164 (1992) 27, 28
Boone v. U.S., 725 F. Supp. 1509 (D. Hawaii 1989) 26
Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986) 16
Davis v. United States, 417 U.S. 333 (1974) 25
Esposito v. South Carolina Coastal Council, 939 F.2d 165 (4th Cir. 1991) 25
Jordan v. Menomonee Falls, 28 Wis.2d 603, 137 N.W.2d 442 (Wis. 1965) 18
McNulty v. Town of Indialantic, 727 F. Supp. 604 (M.D.Fla. 1989) 26
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 22
Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988) 25
Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*
Pennell v. San Jose, 485 U.S. 1 (1988) 14, 23
San Telmo Associates v. Seattle, 108 Wash.2d 20, 735 P.2d 673 (Wash. 1987) 28
Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989) 26, 27
St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) 25
Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal.App.3d 1260 (1991) 27
Tenoco Oil Co., Inc. v. Department of Consumer Affairs, 876 F.2d 1013 (1st Cir. 1989) 25
United States v. Sperry Corp., 493 U.S. 52 (1989) 17
Yee v. City of Escondido, No. 90-1947 (U.S. April 1, 1992) 20

TABLE OF AUTHORITIES—Continued

California Constitution and Statutes	Page
California Constitution	
Article XIIIA, Section 4	4
California Government Code	
§ 50076	4
§ 66001(a) (1), (2)	4
§ 66001(a) (3)	3
§ 66001(a) (4)	3
§ 66001(b)	3
§ 66001(c)	4
§ 66001(d)	4
§ 66001(e)	4
§ 66005(a)	4
Miscellaneous	
Christine Andrew and Dwight Merriam, Defensible Linkage, APA Journal, Spring 1988, at 199	21
Edward Goetz, Office-Housing Linkage Fees in San Francisco, APA Journal, Winter 1990, at 66	21
Nicholas, et al., A Practitioners Guide to Development Impact Fees, American Planning Association, Planners Press, Ch. 14 (1991)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1556

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondents City of Sacramento and Council of the City of Sacramento respectfully request that this Court deny the petition of Commercial Builders of Northern California (hereinafter "petitioner") for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Respondents City of Sacramento and Council of the City of Sacramento (hereinafter "respondent," "city") present the following Statement of the Case to supplement that presented by petitioner. Petitioner's statement omits most of the evidence of nexus before the City, the fact that this evidence was uncontradicted, the legislative fact-finding process by which the City adopted the ordinance under review, and the district court's rulings on state law claims relevant to these proceedings. Petitioner's statement also mischaracterizes the Ninth Circuit's ruling.

A. The 1989 Housing Trust Fund Ordinance

Sacramento's Housing Trust Fund Ordinance (Zoning Code of the City of Sacramento, Section 33, hereinafter "ordinance") establishes a mechanism to help offset the burden imposed on the City's affordable housing program by new low-income workers moving to the City to fill jobs in new commercial buildings.[1] The ordinance imposes fees on six categories of new non-residential development. Ordinance § 33.C.1 (Pet. at D-17). Projects presenting special circumstances or which will involve few employees may apply for a variance exempting them from the fee requirements. Ordinance § 33.F (Pet. at D-28).

The fees range from $.25 to $.95 per square foot, generally less than half the amount which could have been justified based on the extent to which the particular type of development contributes to the increased demand for affordable housing. Ordinance Appendix A (Pet. at D-32; Clerk's Record ("CR") 26 at 927-929).[2] This approach shifted the burden of any uncertainties in the already conservative nexus calculations away from commercial developers to the public at large. The fees imposed under the ordinance will yield less than nine percent of the total cost of the City's low-income housing program. CR 27 at 1190. Taxpayers at large, block grants, and loan guarantees will pay the remaining nine-tenths of the cost. *Id.* The fees may be spent only on affordable housing developments close to the commercial projects charged the fees to insure that the increased housing opportunities are available to low-income workers employed in those projects (the

---

[1] The ordinance applies to all non-residential buildings such as offices, hotels, research and development facilities, retail centers, manufacturing facilities, and warehouses. Ordinance Appendix A, petition (hereinafter "pet.") at D-17. For convenience, these structures are referred to herein as "commercial buildings" or "commercial development."

[2] All citations to the Clerk's Record refer to the volume and page number of the clerk's record in the district court.

"geographic nexus" requirement). Ordinance § 33.B.5 (Pet. at D-15).

B. State Restrictions on Local Government Fees

In 1987, in response to the concerns expressed in this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the California legislature adopted statutory restrictions on development fees imposed by government agencies. This legislation (known as Assembly Bill 1600 and referred to hereinafter as "AB 1600") was intended to protect landowners from being singled out to bear public burdens and to ensure that all local governments complied with *Nollan*'s requirements that land use regulations substantially advance a legitimate state interest.[3] AB 1600 allows local governments to impose development fees only where they have made certain findings and have complied with specific procedures. As Sacramento's ordinance was adopted pursuant to these requirements, they are important to an understanding of this case.

AB 1600 forbids imposition of any development fee unless the local government has demonstrated a cause-and-effect relationship between projects subject to the fee and the problem to be addressed; it must make specific findings that there is a reasonable relationship between:

(1) "the fee's use and the type of development project on which the fee is imposed" (Cal. Gov't Code § 66001(a)(3));

(2) "the need for the public facility [financed by the fee] and the type of development project on which the fee is imposed" (Cal. Gov't Code § 66001(a)(4)); and

(3) "the amount of the fee and the cost . . . of the portion of the public facility attributable to the development on which the fee is imposed." (Cal. Gov't Code § 66001(b)).[4]

---

[3] Codified at sections 66000-66003 of the California Government Code and reproduced in its entirety in Appendix A to this brief.

[4] The City's compliance with these requirements is not before the Court. As discussed in part D, *infra*, the district court determined

In addition, local governments must identify the specific purpose of the fee and the use to which the fee will be put. Cal. Gov't Code § 66001(a)(1), (2). To ensure that fees are not diverted to the local government general fund, AB 1600 further requires that all fees and interest thereon be maintained in a separate fund or account. Cal. Gov't Code § 66001(c). If a development fee is not expended or committed within five years, the local government must make further findings each year thereafter to demonstrate a continuing reasonable relationship between the anticipated use of the fee and the purpose for which it was imposed. Cal. Gov't Code § 66001(d). If this finding cannot be made, the local government is required to refund the fee. Cal. Gov't Code § 66001(e).[5]

C. Preparation and Adoption of the Housing Trust Fund Ordinance

Sacramento adopted its Housing Trust Fund Ordinance after two years of study, public meetings, and hearings. The ordinance was one of a package of recommendations put forth by a housing Task Force appointed by the City and Sacramento County in April, 1987.[6] The Task Force was directed to assess the need for increased low-income housing in Sacramento, to establish reasonable construc-

---

that the City complied with these requirements and that determination was not appealed.

[5] Petitioner challenged the City's compliance with other provisions of the Government Code requiring that fees and exactions "not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed," Cal. Gov't Code § 66005(a), and that any fee or exaction which does exceed the reasonable cost must be treated as a special tax subject to the provisions of California's "Proposition 13" (Article XIII A, section 4 of the California Constitution). Cal. Gov't Code § 50076. The district court determined that the City had complied with these requirements and that determination was not appealed.

[6] The Task Force was composed of members representing all sectors of the community, including commercial developers, the Chambers of Commerce, and the Board of Realtors. CR 27 at 1179.

tion targets to meet that need, and to recommend appropriate financing mechanisms. CR 25 at 1. After approximately thirty public sessions, the Task Force developed an affordable housing construction program and recommended a public/private financing strategy to address both existing and new housing needs. The program to address new needs included the fee ordinance at issue here. CR 26 at 788-89, 897-939.

During the course of the Task Force investigations, this Court issued its decision in *Nollan*. Shortly thereafter, the California legislature incorporated the principles of *Nollan* in Assembly Bill 1600 as described above. *Nollan* and AB 1600 greatly influenced the work of the Task Force. To ensure that its recommended funding mechanisms for low-income housing would be consistent with the *Nollan*/AB 1600 nexus requirement, the Task Force commissioned the consulting firm of Keyser Marston Associates, Inc. (hereinafter "Keyser Marston")[7] to determine the extent of the relationship (if any) between the increased demand for low-income housing and new commercial development. CR 27 at 1041.

In late 1987 Keyser Marston gave its initial report to the Task Force. Pet. at Appendix E. Keyser Marston's report, a supplement, and subsequent testimony set forth the nature and extent of the cause-and-effect relationship between new commercial development and increased demand for low income housing. Keyser Marston explained that new job creation is the primary cause of population growth in Sacramento and that this growth is accompanied by growth in the number of low-income households. CR 29 at 1950. Keyser Marston also demonstrated the link between new jobs and new commercial space. It noted that new jobs could not be created absent commercial de-

---

[7] The Task Force selected Keyser Marston based on the firm's experience on behalf of commercial developers in Sacramento and experise in real estate and urban economics. CR 27 at 1355-56; Declaration of Kate Funk, CR 42 at Ex. C. The Task Force wanted to be certain that the consultant's economic analysis recognized the unique factors affecting project economics in the Sacramento region. *Id.*

velopment to house those jobs and described the decline in employment in cities such as San Francisco which had constrained development of commercial space. CR 29 at 2224, 2233. Keyser Marston then described how each new building would contain a predictable number of workers and, depending on the nature of the commercial activity in the building, a certain number of low-income workers. Pet. at E-3 - E-4. These new workers contribute to the increased demand for affordable housing. Accordingly, Keyser Marston quantified the expected increase in demand for affordable housing based on the number of new very low income households likely to be attracted to the City by development of each of six building types. Pet. at E-1 - E-10. Keyser Martson made a number of conservative assumptions to avoid overstating the increase in demand and to err, if at all, on the side of understating the demand. *Id.*; CR 29 at 1951, 2225-6.

Keyser Marston then translated this increase in demand into a dollars and cents figure representing the level of mitigation fees that would be necessary to respond to the increased demand for low-income housing generated by new development. This calculation represented a "pure nexus" amount—the maximum justifiable charge to each type of commercial development based on its relative contribution to the increased demand.[8] Pet. at E-18.

Finally, to account for any errors in its analysis and to ensure that the fee did not impose an excessive burden (less than 1-3 percent of total construction costs), Keyser Marston also calculated reduced fee amounts ("adjusted fees"). Pet. at E-14, E-21. These adjusted fees were generally less than one-half the "pure nexus" amounts.

In June of 1988 the Task Force submitted its report which included Keyser Marston's work. CR 26 at 788. After holding three public workshops and hearings to con-

---

[8] Subsequent studies and testimony to the City Council indicated that this figure underestimates the necessary subsidy attributable to commercial development by as much as a factor of two. CR 29 at 2225; Declaration of Kate Funk, CR 42 at Ex. C.

sider the Task Force report, the Planning Commission and Sacramento Housing and Redevelopment Agency ("SHRA") recommended approval of the fee ordinance. CR 27 at 1372-1375. Two subcommittees of the Sacramento City Council then heard testimony and received additional reports from staff and Keyser Marston at three public meetings between November, 1988 and February, 1989. CR 27 at 1466-1654; CR 28 at 1796-1945. At the Council's request, Keyser Marston then prepared a supplemental report which explained how its study had established a clear linkage between new non-residential development, greater employment opportunities, and low income housing demand, while taking all variables into account. CR 27 at 1621-1635; CR 28 at 1812-1832, 1934-1945; CR 29 at 1950, 2221-2228.

On March 7, 1989, the full City Council reviewed the factual record, considered Keyser Marston's supplemental report, and heard additional testimony from Keyser Marston and the public. CR 29 at 2182-2317. At the conclusion of the hearing, the City Council adopted the ordinance including the specific findings required by AB 1600.[9] The fees adopted were set at or below the "adjusted fee" levels calculated by Keyser Marston, well below the "pure nexus" amounts justified by the costs attributable to the new development. *Compare* Pet. at D-32 with Pet. at E-21.

---

[9] An index to the 2000-page administrative record is included in appendix B to this brief (Volumes I-V of the administrative record correspond to volumes 25-29 of the clerk's record). In addition to a number of city planning documents and environmental reports, the ordinance was developed based primarily on: discussions at approximately thirty meetings of the Joint City-County Task Force (CR 26 at 788); the Task Force Report (CR 26 at 788-1005); city staff reports (CR 27 at 1147-1229); a commissioned "nexus study," the Keyser Marston report (CR 27 at 1041-1065); a supplement to that report (CR 28 at 1812-1832); extensive testimony before the City by City staff, Keyser Marston, and others; and substantial discussion among City planning commissioners and councilmembers (*see, e.g.*, CR 27 at 1256-1376 (Planning Commission) and CR 29 at 2180-2318 (City Council)).

Throughout these proceedings, neither the petitioner nor anyone else presented the Task Force, the Planning Commission, SHRA, or the City Council with evidence challenging the factual data or assumptions in the nexus reports and testimony prepared by Keyser Marston and City staff. Petitioner opposed the ordinance primarily on policy grounds unrelated to this action.[10] Although petitioner argued that commercial developers should not be required to contribute to solving the housing problems attributable to the workers in their buildings, it provided no studies or facts to contradict the evidence before the City. CR 28 at 1925-1934.

Since the City adopted the ordinance it has continued to study the link between new commercial development and increased demand for affordable housing. In April, 1990 the City and Sacramento County sponsored a study by Keyser Marston to update its 1987 analysis. Keyser Marston Associates, Inc., *Economic Nexus Analysis: Housing Linkage Fee City and County of Sacramento*, April 1990. This led the County to adopt a similar trust fund ordinance to enable the City and County to coordinate their response to the affordable housing problem and to refine the geographic nexus requirement through creation of a City/County zone system. Sacramento County Code, Chapter 16.89. The City also sponsored an additional study in September, 1990 to ascertain appropriate fee levels for non-residential projects falling outside the range of building types addressed in the original ordinance. Keyser Marston Associates, Inc., *Supplemental Report: Economic Nexus Analysis Housing Linkage Fee*, September 1990. On March 31, 1992 the City amended its ordinance to adjust the fee levels, establish a seventh project category, clarify the type of projects falling within each of the categories,

---

[10] Petitioner's objections included concerns that the fee would raise project development costs, drive development out of the City, and change the character of the Sacramento economy. CR 27 at 1535-1545, CR 28 at 1921-1925.

and adopt the City/County zone system. City of Sacramento, Ordinance No. 92-014.

D. District Court Opinion

On April 8, 1989, petitioner filed this lawsuit alleging that the ordinance violated provisions of the United States and California Constitutions and several state statutes, including AB 1600. The district court granted the City's motion for summary judgment on all causes of action and denied petitioner's cross-motion for summary judgment. Pet. at App. B. On the takings issue raised in this petition, the district court found that the Task Force and Keyser Marston reports, staff reports, and oral testimony received by the City Council demonstrated "a substantial nexus between new commercial development and increased demand for low income housing." Pet. at B-5. The court further found that the fee amounts were calculated in a careful and sophisticated manner which erred, if at all, on the side of setting fees too low. Pet. at B-6.

E. Ninth Circuit Opinion

Petitioner appealed only the district court ruling on the takings claim, letting stand all other rulings, including the holdings that the ordinance complied with the requirements of AB 1600 and that the fee did not exceed the costs of meeting the low income housing needs of new employees created by new commercial development. Civil Appeals Docketing Statement (9th Cir.) (No. 89-16398), November 29, 1989, at 3. The Ninth Circuit affirmed the district court judgment. Pet. at App. A. It found on the record before it that the City's extensive review process had established "a substantial connection between development and the problem to be addressed." Pet. at A-7. The court discussed the City's findings regarding the relationship between commercial development and increased demand for affordable housing, the City's conservative assumptions, and noted that the fee represents only a small portion of the City's overall affordable housing program. Judge Beezer dissented from the court's opinion.

On January 7, 1992 the Ninth Circuit rejected petitioner's petition for rehearing and suggestion for rehearing en banc. Pet. at App. C.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW; THE CITY'S LEGISLATIVE DETERMINATIONS SATISFY THE REQUIREMENTS OF THE TAKINGS CLAUSE.

The reasons to deny petitioner's request for certiorari begin and end with the facts of this case—facts omitted by petitioner in its search for a rhetorical theme to catch the eye of this Court. Sacramento set out from the start to comply with the mandates of *Nollan*. The central fact of this case, which was uncontradicted in the abundant record made before the City, is that there is a direct cause-and-effect relationship between new commercial development and increased burdens on the City's low-income housing program. Petitioner promised to provide contrary evidence and studies, but never produced them; the evidence of nexus remained uncontradicted. The record also demonstrated that commercial developers benefit from the availability of an adequate stock of low-income housing. Sacramento did not adopt the ordinance until it had concluded that the evidence showed that the standards of *Nollan* and AB 1600 had been met and exceeded. These facts belie petitioner's claim that the City acted as if *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) did nothing to elevate judicial scrutiny of regulatory takings beyond a traditional "rational basis" test. Pet. at 7. Indeed, the City's factfinding satisfies even *de novo* scrutiny.

The undisputed record before the City made clear that new commercial development was by far the most significant cause of demand for new low-income housing. In light of these facts, simple fairness required that

commercial development shoulder part of the burden it created, rather than having the entire cost placed on taxpayers at large. As with most land use regulations, the Housing Trust Fund Ordinance is based on the inescapable fact of urban life that although development may bring certain benefits to a community (e.g., jobs) it also can bring certain costs (e.g., traffic congestion, pollution and increased demands on city services such as sewage, parks, and affordable housing). Like development fees imposed to address these other costs, the ordinance here is a well-reasoned response to a complex local problem.

A. The City Established a Cause-and-Effect Relationship Between Commercial Development and Demand for Affordable Housing as Required by the Takings Clause and *Nollan*.

The City's factfinding was carefully focused on the requirements of *Nollan* and AB 1600. The Keyser Marston reports and testimony established that new commercial buildings and the jobs they house are the driving force behind population growth in Sacramento. 29 CR 1950. Keyser Marston also demonstrated that despite the public image of office buildings filled with white collar workers, the vast majority of new jobs associated with new commercial development are low-paying jobs.[11] *Id.*; see also CR 26 at 862. Thus, an increase in jobs in Sacramento will be accompanied by an increase in job holders who cannot afford market-rate housing and will place in-

---

[11] For example, the Task Force found that an experienced clerk/typist in Sacramento may earn as little as $8,320 per year. Other low-paying jobs include cashiers, bookkeepers, dental assistants, bank tellers, and electronics assemblers. CR 26 at 863. Thus, while the creation of jobs may provide some benefit to poor people in general, in places such as Sacramento where a large fraction of those jobs do not pay enough to allow the workers' families to afford market rate housing, those new jobs will *exacerbate* the need for low-income housing in the vicinity. CR 26 at 862; CR 29 at 1950-1951.

creased demands on the City's affordable housing program.[12] *Id.* After the City quantified that increased demand, the ordinance set fee amounts well below the amounts resulting from that quantification. The ordinance also required that the new low-income housing be geographically related to the new commercial development. Ordinance § 33.B.5 (Pet. at D-15).

Notwithstanding all this evidence, petitioner makes the extraordinary assertion that the evidence before the City "utterly fails to establish a cause-and-effect relationship" between commercial development and the need for new low-income housing. Pet. at 13. Petitioner appears to base its claim on one phrase taken out of context from Keyser Marston's work—the caution in the first nexus report that it did not "make the case that building construction is responsible for growth." Pet. at 14. As the district court and the Ninth Circuit recognized, the body of Keyser Marston's reports and testimony make clear that this statement means merely that building construction is not the *sole* cause of growth. *See, e.g.*, CR 27 at 1622-1628; CR 29 at 1950-1952, 2221-2234. While acknowledging that a complex web of factors affect migration of low-income households, Keyser Marston emphasized that in mature, growing and diversified economies such as Sacramento, new employment opportunities are the leading cause of increased demand for housing:

> people do not come to a region like Sacramento because there is affordable housing or just because of it. They come because there are jobs here.

---

[12] Contrary to petitioner's argument (Pet. at 5), the City has not assumed that the low-income workers employed in the new commercial buildings must be new migrants to Sacramento. Keyser Marston demonstrated that it is not important which workers actually occupy the new development; a "chain effect" ensures that if existing workers move to the new space, new workers will be attracted to the space vacated by existing workers. CR 29 at 2222. Thus, new development ensures that new low-income workers will come to Sacramento, regardless of which particular buildings they occupy. Petitioner's expert agreed with this finding. CR 28 at 1932.

> And most people, especially low-income people—for most people, no housing is affordable without a job. And that says that you have new [jobs] generating a need for new housing, including low-income housing.

CR 29 at 2223-2224. Thus, in contrast to simpler economies such as resort or retirement communities where housing itself is the major economic engine, in Sacramento the chain of causation begins with jobs. CR 29 at 2221-2234.

In the trial court petitioner conceded that new employment opportunities are one of the reasons that people move to Sacramento. Declaration of David Wade (hereinafter "Declaration"), Pet. at F-3.[13] Yet, in its petition to this Court, petitioner argues that the record before the City did not establish a cause-and-effect relationship. Pet. at 13. Petitioner accomplishes this sleight of hand by equating a "cause-and-effect relationship" with *sole* causation. In other words, because the evidence did not demonstrate that employment growth is the *only* cause of increased demand for low-income housing, but only the most significant among several causes, petitioner argues that *no* cause-and-effect relationship has been demonstrated. Petitioner's true claim, therefore, is not that no causation has been shown, but rather the novel proposition that a fee is impermissible absent a conclusive showing that the underlying activity is the *exclusive* cause of the problem to be addressed by the fee.

Petitioner's "single causation" theory is without merit. In today's complex urban settings virtually no impact is the result of a single cause. Petitioner apparently believes that any public agency that is forthright enough to admit that fact should be barred from imposing fees. In fact, the very cases on which petitioner relies through-

---

[13] The Wade Declaration is discussed in detail in Section I. B, *infra*.

out its briefs recognize that *contribution* to a social problem is the litmus test, rather than petitioner's proposed "single causation" standard.

In *Nollan*, for example, this Court indicated that if the Nollans and other landowners had "contributed to" a problem, a fee to pay for remedying the problem would not be unconstitutional as long as it did not single anyone out disproportionately. 483 U.S. at 835, n.4. The Court further indicated that a permit condition directed at remedying a problem shown to be caused by the applicant "by reason of the cumulative impact with other construction" would not violate the takings clause. 483 U.S. at 835. Similarly, in his dissenting opinion in *Pennell v. San Jose*, 485 U.S. 1, 23 (1988), Justice Scalia refers to "the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is *none* of his creation." (Emphasis added.) The Court's mandate in *Nollan* and Justice Scalia's concern in *Pennell* was not to limit fees and permit conditions to those few situations where sole causation can be shown, but rather to require the agency to analyze the cause-and-effect connection to ensure that the permit condition is not excessive or unconnected to the burdens created by the project. That is what the City did in this case.

B. The City Received No Contradictory Evidence Regarding the Cause-and-Effect Relationship Between Commercial Development and Demand for Affordable Housing; The Ninth Circuit Properly Affirmed Summary Judgment.

Petitioner manages to avoid mentioning the central reason why the district court granted, and the Ninth Circuit affirmed, summary judgment in this case: the evidence regarding nexus remained undisputed throughout the City's two-year factfinding process.

Commercial developers were represented on the Task Force and petitioner's representatives testified several

times during the ordinance review process. With respect to the nexus study, petitioner and other opponents of the ordinance made only conclusory objections, never providing the City with studies or data to support their claims.[14] Petitioner's counsel promised to provide a written report, together with "back-up studies and data," critiquing the Keyser Marston report. However, petitioner never provided such information. CR 29 at 1959.

The only "evidence" ever provided by petitioner to challenge the City's findings came six months after the ordinance was adopted in the form of a declaration in support of petitioner's motion for summary judgment. Declaration, Pet. at F-1. Like the earlier testimony, however, the declaration consisted of little more than unsubstantiated allegations. Indeed, contrary to the central theme of petitioner's argument, the declaration concedes that commercial development contributes to the demand for affordable housing. It states that "[h]ouseholds decide to relocate on the basis of economic factors *including employment opportunity* and housing cost." Pet. at F-4 (emphasis added). In other words, the Wade declaration made the same point made by Keyser Marston and the Task Force: There are multiple causes for households moving to Sacramento, and one of the key causes is employment opportunity.

Even petitioner recognizes the inherent weakness of its declaration. Petitioner's brief to the Court cites the declaration—its sole piece of analytic evidence—only once, for the irrelevant proposition that "employers follow the work force." Pet. at 14. This claim, however, even if

---

[14] Petitioner had ample opportunity to prepare substantive comments. In addition to the Task Force's lengthy deliberative process, a draft of the ordinance was circulated for eight months before final action by the City Council. CR 27 at 1009. Moreover, petitioner's counsel in this Court argued to the Task Force that the Keyser Marston study was inaccurate but never provided any data to support those allegations. CR 26 at 1005.

true is not inconsistent with the evidence that workers come to Sacramento for jobs. Just as firms may come to Sacramento to avail themselves of the Sacramento work force, workers may come to avail themselves of the work opportunities.

The substantial and uncontradicted evidence before the City Council contrasts sharply to the empty nexus record before the Coastal Commission in *Nollan*. The record in this case provided the Ninth Circuit ample authority to affirm the district court's grant of summary judgment.

C. Fundamental Fairness Supports the City's Requirement that Commercial Development Offset at Least Some of the Affordable Housing Program Costs Attributable to That Development; The Ordinance Does Not Single Out Developers to Bear a Public Burden.

The takings clause is founded on concepts of fairness in government regulation. The takings clause ensures that governments act fairly by not imposing undue burdens on certain people when they should be borne by the public as a whole. *See Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 227 (1986). In this case, those same concepts of fairness require that the City's ordinance be upheld. The City's studies have conclusively established that the fee amounts to be paid by commercial developers are *less than half their share* of the housing costs imposed on the City by new commercial development. Equally important, the City's affordable housing program, like adequate transportation facilities and other urban infrastructure, will provide a clear benefit to commercial development by allowing Sacramento to remain an attractive location for new businesses, their employees and their consumers.

The Task Force estimated the total annual cost of the City's affordable housing program to be $42 million. Of this, $11 million was found to be attributable to increased demand created by new commercial development. Pet. at E-19. Yet the ordinance challenged here is ex-

pected to contribute only $3 million to the program with the remainder of the cost to be borne by the public at large—facts not mentioned by petitioner.[15]

Far from being "singled out" for unfair treatment, therefore, commercial developers actually bear less than their share of the City's burden under this ordinance. Although the evidence has established conclusively that commercial development is responsible for far more than the nine percent of the anticipated costs of new low-income demand to be met by trust fund fees, that is the extent of their obligation. The remaining ninety-one percent of the cost is to be paid by the public at large. The City has taken every precaution, with *Nollan* in mind, to avoid placing a disproportionate burden on nonresidential developers.[16]

Despite its calls for "fairness," petitioner argues that the general public should be charged the *full* cost of low-income housing, and commercial builders *none*, even where studies have shown a direct cause-and-effect relationship between the new development and the increased need for such housing. In effect, petitioner wishes taxpayers to subsidize completely the new development, rather than charging fees to cover an amount *less than* the development's fair share of the costs of the housing. There is no merit to this position. The

---

[15] The Task Force recommended that the bulk of the program be financed by traditional sources of City funding such as the general fund, community development block grants, and certain redevelopment funds; state and federal grants and loans; and cooperative programs with the private sector to encourage equity investment, conventional loans, and mortgage revenue bonds. 26 CR 898.

[16] By setting the fees well below the "pure nexus" amounts calculated by Keyser Marston, the City exceeded constitutional requirements. This Court held in *United States v. Sperry Corp.*, 493 U.S. 52, 60-61 (1989), that government fees need only be a "fair approximation of the costs of benefits supplied." The Court declined to require that fee levels be "precisely calibrated" or that they "give weight to every factor affecting appropriate compensation." *Id.* (citations omitted).

evidence shows that it is far fairer to the citizens and taxpayers of Sacramento to apply the ordinance than to follow petitioner's argument and require the housing subsidies to be provided entirely by the City's taxpayers, none of whom are, in petitioner's words, more "responsible" for the need for additional low-income housing than is commercial development.

D. Petitioner's Novel Theories Would Undermine Governmental Authority To Impose Widely Accepted Impact Fees.

Petitioner argues that the Ninth Circuit's ruling will open a Pandora's Box of government regulations imposing on developers the costs of solving society's problems. Pet. at 8-9. Sacramento's ordinance is invalid, petitioner claims, because "commercial developers do not cause people to be poor" and thus should be exempt from any regulation which addresses that social problem. Pet. at 15. Petitioner thus asks this Court to find in the takings clause not only the requirement of a cause-and-effect relationship, but also the additional ill-defined requirement that an activity be directly "responsible" for the problem to which the fee is addressed.

Petitioner's argument compounds error upon error. First, petitioner's proposed new "responsibility" standard has no constitutional basis. Petitioner cites no authority for its novel theory which would eliminate the most traditional impact fees—fees which even petitioner appears to concede are constitutional. Petitioner would not question the constitutionality, for example, of an ordinance levying fees in connection with new residential subdivisions to pay for new roads or parks and recreational facilities to serve the subdivision.[17] Pet. at 17, n.12.

---

[17] By creating new facilities that contribute to the arrival of new people in the area, a project sponsor can be required to pay a fee to help cover the costs of providing transportation facilities or parks for new people. *Jordan v. Menomonee Falls*, 28 Wis.2d 603, 617-618, 137 N.W.2d 442, 447-449 (1965) (cited with approval in *Nollan*,

Yet, residential structures are not "responsible" for the fact that the residents have cars and use parks and recreation facilities and therefore contribute to the need for additional roads beyond the boundaries of the new development. Moreover, new residential development typically is only one of many factors bringing new residents (and thus new drivers and park users) to the area. Under petitioner's theory, however, these facts would be sufficient to invalidate such an ordinance. Fortunately, neither *Nollan* nor any other case to date requires that a regulated activity by itself, in isolation from other factors, have (1) motivated the arrival of new residents and (2) caused them to possess needs for government services.

Second, by basing its argument on a string of hypothetical ordinances not before the Court, petitioner neglects the facts of the case at hand. The Ninth Circuit decision does not authorize impact fees without a clearly demonstrated cause-and-effect relationship between the impact and the burden. Sacramento's ordinance was anything but the "quick fix" funding mechanism to which petitioner implies agencies will resort as a result of this decision. The evidence was undisputed. The City's two-year review, complete with three dozen public hearings and workshops, experts, and reports clearly demonstrates that compilation of a record that meets the constitutional standard described in this case is a complex and difficult process. A process such as Sacramento followed in this instance does not "circumvent" the democratic process by "compelling wealth transfers . . . with relative invisibility" as alleged by petitioner.[18] Pet. at 12. It is the

---

supra, 483 U.S. at 840). The challenged ordinance is no different. It requires commercial developers to pay a fee to cover a small portion of the costs of the low-income housing needed by the people who will work in the new buildings.

[18] The fact that the ordinance may effect a wealth transfer is not relevant to the questions before the Court. This Court recently noted that most land use regulation effects wealth transfers and reaffirmed

embodiment of the proper functioning of the process. It is difficult to conceive of a governmental decisionmaking process that is more detailed or involves a higher level of public review and participation than the decisionmaking that occurred in the case at hand.

Third, petitioner's spectre of commercial developers across the land being forced to single-handedly shoulder the burden of all society's ills ignores the fact that Sacramento's ordinance does not ask that commercial development solve Sacramento's *existing* low-income housing problem. Rather, it requires them to contribute a small amount to address part of a *new* housing problem that they helped to create. By bringing in lower income families, commercial buildings contribute to an increased need for low-income housing in the City, just as they contribute to the need for new roads, sewer systems, water supply, parks, and other government facilities and services. Absent construction of the new commercial buildings, the need for new low-income housing would be substantially less than it would be if the development occurs.

Petitioner's theory also disregards AB 1600 and the California legislature's careful efforts to ensure that local governments respond to the mandate of *Nollan* (discussed *supra*, page 3). Taken together, AB 1600's requirements for explicit findings, segregation of funds, and regular review of fund expenditures, operate to ensure that only those development fees which substantially advance a legitimate government interest will pass muster in California.[19] In not appealing the district court's ruling

---

the well-established principle that such transfers do not transform a regulation into a taking. *Yee v. City of Escondido*, No. 90-1947, slip op. at 8 (U.S. April 1, 1992).

[19] As introduced, AB 1600 required local governments to demonstrate only a "rational relationship" consistent with California law at the time. *See*, Assembly Bill 1600, as introduced March 5, 1987. Following this Court's decision in *Nollan*, the state senate amended the bill to require demonstration of a "reasonable relationship." *See*, Assembly Bill 1600, as amended August 18, 1987. Without attempt-

that the City complied with the strict requirements of AB 1600 petitioner argues that the takings clause requires something more—in effect asking this Court to hold that AB 1600 is inadequate to satisfy the mandates of *Nollan*.

Finally, petitioner's theory would undermine all of the work done by planners, economists and government agencies to develop strategies for evaluating social problems and potential regulatory solutions that are consistent with the constitutional requirements described in *Nollan*.[20] Over the past five years since *Nollan* was decided, government officials and their consultants have come a long way in defining methodologies and fact-finding approaches necessary to allocate certain project costs back to the project proponents in a way that is fair. Petitioner's theory would dismantle all of this work with one swift stroke.

If petitioner's theory were to prevail in this case, local governments would be barred from attempting to allocate most new infrastructure and service costs in any sort of proportionate manner. They would likely be forced to limit development to match the reduced pace of necessary infrastructure improvements. The prospect of unconstitutional takings would lie behind every regulation, no matter how carefully an agency did its homework to establish and document a nexus.

---

ing to parse the difference, if any, between "reasonable relationship" and "substantially advance," the City believes that this elevation of the standard coupled with the legislation's other provisions requires the rigorous legislative factfinding process described in the Statement of the Case and mandated by *Nollan*.

[20] *See e.g.*, Nicholas, et al., *A Practitioners Guide to Development Impact Fees*, American Planning Association, Planners Press, Ch. 14 (1991); Edward Goetz, *Office-Housing Linkage Fees in San Francisco*, APA Journal, Winter 1990, at 66; Christine Andrew and Dwight Merriam, *Defensible Linkage*, APA Journal, Spring 1988, at 199.

II. THE NINTH CIRCUIT PROPERLY APPLIED A HEIGHTENED DEGREE OF SCRUTINY AS REQUIRED BY *NOLLAN* AND OTHER CASES OF THIS COURT.

Petitioner mischaracterizes the decision below, asserting that the Ninth Circuit mistakenly applied the rational basis test applicable in due process and equal protection challenges. Pet. at 5, 18. A proper analysis of the Ninth Circuit opinion, however, shows that the portion of the opinion cited by petitioner refers to the state of the law pre-*Nollan* rather than to the panel's holding. The court's actual holding was that the evidence showed a "substantial connection between development and the problem to be addressed" sufficient to pass constitutional muster under *Nollan*. Pet. at A-7.

Had the Ninth Circuit applied a traditional rational basis review as petitioner claims, it would have inquired simply whether the City Council could reasonably have concluded that the ordinance would achieve its goal of supplying affordable housing. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). The decision below did not employ such a traditional rational basis review. The Ninth Circuit based its holding on a close analysis of the City's process and the evidence of nexus considered in adopting the ordinance. *See also, Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582-583 (9th Cir. 1991). The decision described the City's extensive study process, the conservative assumptions used in determining the fee levels, and the specific finding by the City Council "that non-residential development is a major factor in attracting new employees to the region and that the influx of new employees creates a need for additional housing in the City." Pet. at A-3. The court particularly noted that the ordinance would raise only nine percent of the total projected annual cost of the City's affordable housing program and that the remainder would be financed from other public sources. *Id.*

The Ninth Circuit found it unnecessary to state precisely the level of scrutiny that *Nollan* requires. Because the strong factual showing in this case would satisfy any level of review, the Ninth Circuit's narrowly drawn decision held only that a few ordinance implemented "only after a detailed study revealed a substantial connection between development and the problem to be addressed," satisfies the requirements of the takings clause. Pet. at A-7.

The Ninth Circuit's approach also was consistent with Justice Scalia's dissent in *Pennell v. San Jose*, *supra*, which noted that land use regulation was permissible under the takings clause wherever

> there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the problem, it cannot be said that he has been singled out unfairly.

485 U.S. 1, 20. Here, the City's legislative factfinding determined that new commercial development increases demands on the City's affordable housing program. The evidence also demonstrated that commercial development benefitted from the City's existing affordable housing and would benefit further from the expanded program to be partially funded by the fee ordinance. CR 29 at 2224.

Thus, the situation at bench bears no resemblance to the facts in *Pennell* that gave rise to Justice Scalia's dissent. The ordinance challenged in *Pennell* would have required that landlords reduce the rent for any hardship tenant residing on their property. 485 U.S. at 4-6. The requirement applied to existing landlords who happened to rent to hardship tenants and was not imposed as a condition on a new land use. Justice Scalia's objection was that the landlord had done nothing to create any impacts addressed by the "hardship tenant" requirement. *Id.*

Sacramento's fee ordinance creates none of these problems. The fee is imposed only when a developer chooses to undertake a voluntary act (apply for a permit to construct a non-residential building) which the City has conclusively demonstrated will increase the burden on the City's affordable housing program. The fee has been tailored to ensure that it addresses only the consequences of the developers' prospective actions and nothing more.

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS.

Petitioner's claim that the Ninth Circuit decision conflicts with the decisions of other federal or state courts is disingenuous. This Court's message in *Nollan*—that restrictions on property rights will be upheld only where legislative factfinding has demonstrated that the regulation substantially advances a legitimate government purpose—has been consistently applied by the Ninth Circuit, other federal courts and the states. Neither this case nor any case cited by petitioner suggests any basis or need for this Court to address the questions presented.

A. There is No Conflict Among the Federal Courts.

The few circuits which have applied *Nollan* in concrete disputes have done so in a summary fashion. None has applied a more demanding analysis than the Ninth Circuit in the case at bench and none of the opinions indicates either the existence of a conflict or a need for this Court to intervene. The weakness of petitioner's conflict claim is aptly illustrated by the primary case it relies upon to support the claim, *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991). There is no distinction between the "close analysis" called for in *Azul* and the panel's insistence on a substantial connection between means and ends in this case. The Ninth Circuit affirmed this point in denying, without dissent, petitioner's suggestion for rehearing *in banc* in this case after

Azul was issued.[21] In any event, certiorari is not appropriate to resolve an alleged intra-circuit conflict. *Davis v. United States*, 417 U.S. 333, 340 (1974).

A survey of the other circuits that have considered *Nollan* indicates no conflict among the circuits and in fact little substantive discourse on the matter. In the only other circuit court opinion cited by petitioner, the First Circuit discussed *Nollan* only to note that "analysis under the takings clause may be different from that under the due process clause" and declined to reach the takings claim on ripeness grounds. *Tenoco Oil Co., Inc. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020-21, 1024 (1989). The Second Circuit in *St. Bartholomew's Church v. City of New York* noted *Nollan*'s "substantially advance" language and held without discussion that New York City's landmark preservation ordinance meets that standard. 914 F.2d 348, 357 n.6 (2d Cir. 1990), *cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 111 S. Ct. 1103 (1991). In *Naegele Outdoor Advertising, Inc. v. City of Durham*, the Fourth Circuit held that Durham's billboard ordinance "advance[d] the legitimate city interest in aesthetics" and distinguished *Nollan* on the basis that the Coastal Commission condition "did not serve a governmental purpose related to the permit" sought by the Nollans.[22] 844 F.2d 172, 178 (1988). The Fifth Circuit too noted *Nollan*'s admonition that land use regulation must "substantially advance [a] legitimate state

---

[21] The suggestion for rehearing *in banc* was rejected unanimously by the panel and no judge of the court requested a vote on the suggestion. Order, Jan. 7, 1992 (9th Cir. No. 89-16398) (Pet. at App. C).

[22] In *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169 (1991), *petition for cert. filed*, 60 U.S.L.W. 3453 (U.S. Dec. 5, 1991) (No. 91-941), the Fourth Circuit applied *Nollan* to require a "logical and sufficiently well founded approach" to sustain coastal protection legislation—a standard that, if anything, appears somewhat less protective of property rights than the "substantial connection" found by the Ninth Circuit in this case.

interest" in holding that application of the *Nollan* standard would not change an earlier holding that the National Flood Insurance Program did not constitute a taking.[23] *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir. 1988).

Nothing in any of these cases or the decision below suggests a conflict among the federal courts. Consistent with each of these cases, the Ninth Circuit acknowledged *Nollan*'s emphasis on the "substantially advance" aspect of the traditional takings test as set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Any difference between the Ninth Circuit's approach here and that of other circuits lies not in the substantive standard of review, but in the extent to which it carefully explained the basis for its decision that the City had established a "substantial connection" between the regulated activity and the problem to be addressed. Pet. at A-7, A-2 - A-5. This is not a basis for granting certiorari.

B. There is No Conflict with the Decisions of State Courts.

Nor is there any conflict between the decision below and any state court decisions. Rather, the state court decisions cited by petitioner apply *Nollan* and the requirements of the takings clause in the same manner as the Ninth Circuit, but to facts entirely different from those at bench. *Seawall Associates v. City of New York*, cited by petitioner, applied *Nollan* to invalidate New

---

[23] Petitioner also cites two district court opinions. Pet. at 20. In *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 614 (M.D.Fla. 1989), the court, like the district court and Ninth Circuit in this case, reviewed the record before the city, noted the absence of any contradictory evidence and upheld the dune protection ordinance in question. *Boone v. U.S.*, in dicta, indicated without elaboration that *Nollan* would have operated to invalidate a permit condition constituting "a permanent conveyance of continuous public access to the permittee's property" had the court not interpreted the condition more narrowly. 725 F. Supp. 1509, 1523 (D. Hawaii 1989), *modified* 743 F. Supp. 1367 (1990), *aff'd* 944 F.2d 1489 (9th Cir. 1991).

York City's fee of $45,000 per unit for landowners wishing to demolish or convert single-room occupancy properties. 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989), *cert. den. sub nom. Wilkerson v. Seawall Associates*, 493 U.S. 976 (1989). In contrast to the case at hand, the record in *Seawall* revealed a complete mismatch between the goals of the regulation and its actual effect. The *Seawall* court found that the ordinance provided "no assurance" that it would provide a housing supply for homeless or low-income families and noted that the City's own nexus study had concluded that the ordinance "would do little to resolve the homeless crisis." *Id.* at 111. *Seawall* thus affirms the analytical approach used in this case, where the Ninth Circuit upheld the ordinance only after reviewing the evidence demonstrating a clear and quantifiable connection between commercial development and the need for affordable housing.

The California court of appeal decision in *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App.3d 1260 (1991), is also consistent with the decision below. *Surfside* employed an analytical approach identical to that of Ninth Circuit. It reviewed the record before the Coastal Commission and overturned certain permit conditions after finding that the conditions were based solely on "general studies which, because of unique or usual [circumstances], may not even apply to the case at hand." *Id.* at 1270. Here, the court's review of the evidence revealed a detailed study of the jobs-housing market in Sacramento. And the ordinance establishes criteria for geographic proximity between the proposed commercial development and affordable housing sites. Ordinance § 33.B.5 (Pet. at D-15). In addition, while the Coastal Commission in *Surfside* had been presented with substantial conflicting evidence, the City's nexus study and related proceedings in this case revealed no evidence contradicting its nexus finding.

Petitioner also refers the Court to the California court of appeal decision in *Blue Jeans Equities West v. City*

and County of San Francisco, 3 Cal.App.4th 164 (1992). That case considered the views of some commentators that any heightened scrutiny requirement under *Nollan* applies only to conditions or exactions diminishing a party's interest in real property (e.g., the lateral access easement in *Nollan*) and not to conditions affecting personal property (e.g., fee payments). *Id.* at 169.

This aspect of *Nollan*'s scope was neither briefed nor relevant in this case. Because AB 1600 effectively makes *Nollan* applicable to all development fees in California, the City has never disputed that *Nollan* establishes the proper standard of review. For the same reason, AB 1600 makes this issue moot throughout California. In *Blue Jeans Equities* the fee requirement was imposed prior to AB 1600's effective date of January 1, 1988. In any event, the result petitioner complains of in *Blue Jeans Equities* provides no basis for granting certiorari in this case and nothing in the Ninth Circuit opinion, district court ruling, or record before the City addresses the issues raised in *Blue Jeans Equities*.

Finally, petitioner makes the baseless claim that this case conflicts with *San Telmo Associates v. Seattle*, 108 Wash.2d 20, 735 P.2d 673 (Wash. 1987). That case did not discuss *Nollan*, the takings clause, the U.S. Constitution, or any decision of this or any other federal court. There, Washington's supreme court applied a state statute to invalidate a fee on low-income housing conversion.[24] As interpreted by the court, the statute in question prohibited any regulation, "the primary purpose of [which] is to accomplish desired public benefits which cost money."[25]

---

[24] This fact too distinguishes *San Telmo* and *Seawall* from this case. Whereas the ordinances at issue in those cases effectively served to require the landowner to pay a fee to go out of the single-room occupancy hotel business, the ordinance here applies only prospectively and depends on the use to which the landowner chooses to put his or her land.

[25] A further distinction lies in the fact that this statute may act to prohibit the very type of fees which in California are authorized by AB 1600.

Id. at 24. The case is irrelevant to the decision below which is based entirely on the Court's decisions under the U.S. Constitution.

Far from demonstrating a conflict among the nation's courts, the decision below and cases cited by petitioner instead reveal a consistent application of *Nollan* and the takings clause to differing factual situations. The limited substantive application of *Nollan* in other court decisions fully supports the Ninth Circuit's careful analysis. Each case has held in essence that a local regulation may withstand a takings challenge only where the local government has established a substantial connection between the regulated activity and the aims of the regulation. The facts of this case and the decision below illustrate that the scrutiny demanded by *Nollan* promotes clear legislative factfinding and need not interfere with legitimate responses to the serious problems facing local government today. As applied by the state and federal courts, *Nollan* illustrates to local governments the importance of a well defined process and strong substantiation of the nexus between development impacts and conditions imposed to address those impacts.

CONCLUSION

For the reasons stated herein, the Court should deny Commercial Builders' petition for certiorari.

Respectfully submitted,

SHARON SIEDORF CARDENAS
TED KOBEY, JR.
Office of the City Attorney
City of Sacramento
921 Tenth Street
Seventh Floor
Sacramento, CA 95814
(916) 264-5346

MARC B. MIHALY *
ALLETTA D'A. BELIN
RICHARD S. TAYLOR
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272
Counsel for Respondents

* *Counsel of Record*

Dated: April 28, 1992

APPENDICES

APPENDICES

APPENDIX A

Assembly Bill No. 1600

CHAPTER 927

An act to add Chapter 5 (commencing with Section 66000) to Division 1 of Title 7 of the Government Code, relating to development projects.

[Approved by Governor September 21, 1987. Filed with Secretary of State September 22, 1987.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1600, Cortese. Development projects: fees.

(1) Existing law imposes various requirements with respect to fees exacted in connection with land development approvals by public agencies.

This bill would, with certain exceptions, require specified local agencies establishing, increasing, or imposing fees (not including taxes or assessments) for specified public improvements, services, or community amenities to be collected from applicants for approval of development projects to make specified findings, segregate the fees in special accounts, reexamine the necessity for the unexpended balance of the fee, as specified, every 5 years, and refund to the then current owner or owners of the development project any unexpended portion of the fee for which need cannot be demonstrated at the time of this review, together with any accrued interest. The bill would permit various methods of refund, and would permit a local agency to utilize moneys otherwise subject to refund for other purposes serving the development project for which the fee was paid if the cost of making the refund exceeds its amount, as determined at a noticed public hearing. The above requirements would impose a state-mandated local program. Local agencies imposing these fees for defined facilities or improvements would be au-

thorized to adopt and annually review a specified capital facilities plan. The bill would become operative January 1, 1989.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $500,000 statewide and other procedures for claims whose statewide costs exceed $500,000.

This bill would declare that there are no costs in this act requiring reimbursement, but would recognize that local agencies and school districts may pursue any available remedies to seek reimbursement for these costs.

The people of the State of California do enact as follows:

SECTION 1. Chapter 5 (commencing with Section 66000) is added to Division 1 of Title 7 of the Government Code, to read:

CHAPTER 5. FEES FOR DEVELOPMENT PROJECTS

66000. As used in this chapter:

(a) "Development project" means any project undertaken for the purpose of development. "Development project" includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.

(b) "Fee" means a monetary exaction, other than a tax or special assessment, which is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, or fees col-

lected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4.

(c) "Local agency" means a county, city, whether general law or chartered, city and county, school district, special district, or any other municipal public corporation or district; provided that "local agency" does not include a school district if Senate Bill No. 97 of the 1987-88 Regular Session is enacted and becomes effective on or before January 1, 1988.

(d) "Public facilities" includes public improvements, public services, and community amenities.

66001. (a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or

portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 53077.

(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

(e) The local agency shall refund to the then current record owner or owners of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to this subdivision. A local agency may refund the unexpended or uncommitted revenues by direct payment, by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

If the administrative costs of refunding unexpended or uncommitted revenues pursuant to this subdivision exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

66002. (a) Any local agency which levies a fee subject to Section 66001 may adopt a capital improvement plan, which shall indicate the approximate location, size, time of availability, and estimates of cost for all facilities or improvements to be financed with the fees.

(b) The capital improvement plan shall be adopted by, and shall be annually updated by, a resolution of the governing body of the local agency adopted at a noticed public hearing. Notice of the hearing shall be given pursuant to Section 65090. In addition, mailed notice shall be given to any city or county which may be significantly affected by the capital improvement plan. This notice shall be given no later than the date the local agency notices the public hearing pursuant to Section 65090. The information in the notice shall be not less than the information contained in the notice of public hearing and shall be given by first-class mail or personal delivery.

(c) "Facility" or "improvement," as used in this section, means any of the following:

(1) Public buildings, including schools and related facilities; provided that school facilities shall not be included if Senate Bill 97 of the 1987-88 Regular Session is enacted and becomes effective on or before January 1, 1988.

(2) Facilities for the storage, treatment, and distribution of nonagricultural water.

(3) Facilities for the collection, treatment, reclamation, and disposal of sewage.

(4) Facilities for the collection and disposal of storm waters and for flood control purposes.

(5) Facilities for the generation of electricity and the distribution of gas and electricity.

(6) Transportation and transit facilities, including but not limited to streets and supporting improvements, roads, overpasses, bridges, harbors, ports, airports, and related facilities.

(7) Parks and recreation facilities.

(8) Any other capital project identified in the capital facilities plan adopted pursuant to Section 66002.

66003. This chapter does not apply to a fee imposed pursuant to a reimbursement agreement by and between a city or county and a property owner or developer for that portion of the cost of a public facility paid by the property owner or developer which exceeds the need for the public facility attributable to and reasonably related to the development. This chapter shall become operative on January 1, 1989.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution, because this act does not mandate a new program or higher level of service on local government. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 4 (commencing with Section 17550) of Part 7 of Division 2 of Title 2 of the Government Code.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. CIV 89-638 EJG

COMMERICAL BUILDERS OF NORTHERN CALIFORNIA, and
ITS AFFECTED MEMBERS,
Plaintiffs and Petitioners,

v.

CITY OF SACRAMENTO, COUNCIL OF THE
CITY OF SACRAMENTO, and DOES 1-20, inclusive,
Defendants and Respondents.

Date: September 8, 1989
Time: 1:45 p.m.
Dept: Courtroom No. 2

INDEX TO ADMINISTRATIVE RECORD

INDEX TO ADMINISTRATIVE RECORD

VOLUME I	Pages	Tab No.
Resolution No. 87-058, February 3, 1987	00001-00003	1
Final Environmental Impact Report, City of Sacramento General Plan Update, March, 1987	00004-00575	2
VOLUME II		
Resolution No. 88-058, January 19, 1988	00576-00578	3
Findings of Fact and Statement of Overriding Considerations for the Adoption of the Sacramento General Plan Update	00579-00689	4
North Natomas Settlement Agreement, March 29, 1988, City Agreement No. 87241, together with attachments	00690-00787	5
Housing Assistance Plan, Program and Financing Strategy, June 6, 1988	00788-01005	6
VOLUME III		
July 21, 1988 Staff Report on Proposed Housing Trust Fund Ordinance together with attachments	01006-01039	7
November 25, 1987 Nexus Report Prepared by Keyser Marston Associates, Inc.	01041-01065	8
Transcript of the Meeting of City Planning Commission, July 21, 1988	01066-01142	9
Staff Report Submitted to Planning Commission and Sacramento Housing and Redevelopment Agency, October 24, 1988, together with Correspondence and Other Attachments Submitted with the Report	01143-01229	10
City of Sacramento Initial Study and Discussion of Initial Study, October 12, 1988, together with Copy of the Ordinance	01230-01254	11
Negative Declaration Prepared by Environmental Coordinator of the City of Sacramento, October 10, 1988	01255-	12
Transcript of Joint Meeting of the City Planning Commission and the Sacramento Housing and Redevelopment Agency, October 24, 1988	01256-01376	13

VOLUME III—Continued	Pages	Tab No.
Staff Report Submitted to Transportation and Community Development Committee, Budget and Finance Committee, November 29, 1988, together with attachments submitted to that Joint Committee	01377-01465	14
Transcript of Joint Meeting of the Transportation and Community Development Committee and the Budget and Finance Committee, November 29, 1988	01466-01559	15
Transcript of Joint Meeting of the Transportation and Community Development Committee and the Budget and Finance Committee, December 6, 1988	01560-01654	16
VOLUME IV		
Summary of Housing Assistance Plan, Program and Financing Strategy Submitted to Redevelopment Agency, Housing Authority, and City Council of the City of Sacramento, November 15, 1988	01655-01660	17
Amended Resolution No. 88-1055, Adoption by the Sacramento City Council of Housing Assistance Plan, Program and Financing Strategy, December 13, 1988	01661-01662	18
Amended Resolution No. 88-050, Adoption by the Housing Authority of the City of Sacramento of Housing Assistance Plan, Program and Financing Strategy, December 13, 1988	01663-01664	19
Amended Resolution No. 88-088, Adoption by the Redevelopment Agency of the Housing Assistance Plan, Program and Financing Strategy, December 13, 1988	01665-01666	20
Negative Declaration on Housing Assistance Plan, Program and Financing Strategy, August 17, 1988, together with Environmental Impact Section Initial Study	01667-01679	21
Notice of Determination, February 1, 1989	01680-	22
Staff Report Submitted to City Council, December 13, 1988	01681-01682	23
Staff Report Submitted to Transportation and Community Development Committee, Budget and Finance Committee, November 29, 1988, together with attachments submitted with the Staff Report	01682-01779	24

VOLUME IV—Continued	Pages	Tab No.
Notice to All Interested Persons, December 20, 1988	01780-01783	25
Transcript of City Council Meeting, December 13, 1988	01784-01795	26
Staff Report Submitted to Transportation and Community Development Committee, Budget and Finance Committee, February 7, 1989	01796-01811	27
Memorandum by Keyser Marston Associates re: Comparison of Fees, January 27, 1989	01812-01832	28
Additional Correspondence Submitted with the February 7, 1989 Staff Report	01833-01875	29
Transcript of City Council Meeting, February 7, 1989	01876-01946	30
VOLUME V		
Staff Report to City Council, March 1, 1989	01947-01958	31
Letter from Christina J. Savage to Jim Jackson, February 17, 1989	01959-01968	32
Additional Correspondence Submitted by Staff to the City Council with the March 1, 1989 Staff Report	01969-02180	33
Transcript of City Council Meeting, March 7, 1989	02181-02318	34
Resolutions No. 89-180, 89-181, 89-182, March 7, 1989	02319-02321	35
Amended Ordinance No. 89-013, Adopting the Housing Trust Fund Ordinance, March 7, 1989	02322-02344	36
Notice of Determination of Adoption of Housing Trust Fund and Certification of Negative Declaration, March 8, 1989	02345-	37

DECLARATION OF SERVICE BY MAIL

Re: Case No. CIV 89-638 EJG

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, State of California, and not a party to the above-entitled cause. On July 19, 1989, I served a true copy of the within

INDEX TO ADMINISTRATIVE RECORD

by guaranteed overnight delivery service, by placing a true copy thereof in a pre-paid, sealed Federal Express envelope and causing it to be handed to an authorized agent with instructions for next day delivery to the party at the address listed below.

Christina J. Savage
Joel S. Levy
HEFNER, STARK & MAROIS
2710 Gateway Oaks Drive
Suite 300 South
Sacramento, CA 95833

I do hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 1989, at San Francisco, California.

/s/ Janet Paine
JANET PAINE